No. 16,298

In the

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a corporation,
Appellee.

Brief for Appellee

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Preliminary Statement

The instant appeal is by Libelant from the decree of the Court below, granting the motion of Respondent Pan American World Airways, Inc., (hereinafter referred to as "Pan American") for summary judgment.

The motion was made upon the ground that the pleadings and a Stipulation of Facts filed by the parties demonstrated that upon the basis of undisputed facts Pan American was entitled to judgment as a matter of law (Tr. 13-14).

The instant action was commenced by Virginia J. King, Administratrix of the Estate of John Elvins King, in the United States District Court, and was sought to be founded upon the Death on the High Seas Act (Libel, Paragraph VIII, Tr. 6). The Libel (in Paragraph V thereof) alleged that on November 8, 1957 decedent King was employed by Respondent Pan American aboard an airplane owned and operated by Pan American and that while said airplane was in flight "and while said John Elvins King was *within the course and scope of his employment* with Respondent Pan American * * * " (emphasis added) the plane crashed upon the high seas, killing the decedent. The Libel then generally alleged negligence on the part of Pan American and others (Tr. 5), and sought $275,000 damages for and on behalf of Virginia J. King, Melissa A. King and Richard R. King, as the decedent's surviving widow and children (Libel, Paragraphs XIV and XV, Tr. 7-8).

Pan American's Answer to the Libel, after denying negligence, set up the affirmative defense that the death of decedent King was an industrial accident subject to and governed by the provisions of the California Workmen's Compensation Act, that the remedies afforded by said Act provided the sole and exclusive remedy against the employer, Pan American, and barred the action (Answer, Paragraph IV, Tr. 9-10).

The Stipulation of Facts (Tr. 15-19) shows that the decedent King had been an employee of Pan American for some fifteen years, hired at San Francisco, California, and at the time of his death (and for the last ten years) had been based at Pan American's main base for its Pacific-Alaska division, located at San Francisco International Airport. He held the position of Flight Service Supervisor, in which job he spent much of his time at the San Francisco base, and the remaining working time in in-flight super-

vision and observation of pursers, stewards and stewardesses employed on Pan American aircraft flying in and out of San Francisco, California. He was a resident of California at the time of his death. During the flight in question he was "performing services growing out of and incident to his employment, and was acting within the course of his employment" (Stipulation of Facts, Paragraphs 2-5) Tr. 16-17).

Pan American and its workmen's compensation insurance carrier filed an application before the California State Industrial Accident Commission to determine the liability of Pan American for death benefits and burial expense under the California Workmen's Compensation Act; Libelant Virginia J. King and decedent King's children were made parties to said proceedings. On February 20, 1958, a hearing was had before the Industrial Accident Commission upon said application, at which time Virginia J. King appeared through counsel and contested the jurisdiction of the Industrial Accident Commission. Subsequent to said hearing, the Industrial Accident Commission made its order, making an award in favor of Virginia J. King, Richard R. King and Melissa A. King, of a death benefit in the sum of $15,000; said award became final (twenty days after issuance) upon April 21, 1958 (Stipulation of Facts, Paragraph 6, Tr. 18-19).

After the hearing of Pan American's motion for summary judgment and the filing of written briefs by both sides, the District Court, the Honorable Louis Goodman, granted the motion and entered the decree now appealed from. At the time of entering the order, Judge Goodman filed a carefully reasoned opinion (reported as *King v. Pan American World Airways,* 1958, 166 Fed. Supp. 136) discussing the issue raised in the case and the reasons why the California Workmen's Compensation Act precluded Libelant's action.

The Relevant Statutes

The relevant statutes are as follows:

(1) The Death on the High Seas Act (March 30, 1920, c. 111, Sections 1-7, 41 Stat. 537, 46 U.S.C.A. Sections 761-767):

Section 1:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

* * * * * * *

Section 7:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

(2) The California Workmen's Compensation Act (cited as Sections in the California Labor Code):

Section 3600:

> "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death,

in those cases where the following conditions of compensation concur: * * *"

Section 3600.5:

"(a) If an employee who has been hired or is regularly employed in this State receives personal injury by accident arising out of and in the course of such employment outside of this State, he, or his dependents in case of his death, shall be entitled to compensation according to the law of this State * * *"

Section 3601:

"Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death."

Section 3706:

"If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this divison did not apply."

Section 5305:

"The commission has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire was made in this State. Any such employee or his dependents shall be entitled to the compensation or death benefits provided by this division."

The Issue in This Case

The issue in this case was well stated by Judge Goodman, at the outset of his opinion, to be:

> "* * * whether the California Workmen's Compensation Act precludes an action for wrongful death under the Federal Death on the High Seas Act by the administratrix of the estate of an airline employee who in the course of his employment was killed in the crash of an airliner on the high seas." (166 Fed. Supp. at 137)

It was common ground between Libelant and Respondent that the death of decedent King in this case was an industrial injury, arising during the course of his employment as Flight Service Supervisor aboard that certain Pan American airplane which crashed between San Francisco and Honolulu November 8, 1957; that said death was the subject of a proceeding before the Industrial Accident Commission of California; and that the Commission assumed jurisdiction over Libelant's objection and made a death benefit award to Libelant and the children of said decedent. The issue to be decided by the District Court was whether a further and additional recovery against decedent's employer might also be had for that industrial injury by the surviving widow and children under the provisions of the Federal Death on the High Seas Act. The District Court held it could not.

Appellant's Opening Brief Does Not Meet the Only Issue in This Case

As noted, Judge Goodman's opinion in this case in the District Court clearly stated the issue, and the reasoning by which he reached his conclusion that Pan American was entitled to judgment. In their Opening Brief, however, Appellant's counsel discuss neither this issue nor the reasoning of the District Court's opinion, and the authorities

they cite are almost totally irrelevant to the question.

Thus, they cite exactly three cases (other than the District Court opinion in this case) and two treatises. The irrelevancy of the three cases is quickly demonstrated.

Higa v. Transocean Airlines, C.C.A. 9, 1955, 230 Fed. (2d) 780, was a *passenger* case. The issue was whether an action under the Death on the High Seas Act must be brought on the admiralty side of the Federal Court, or whether it could be brought on the law side; the court held that under the language of Section 1 of the Act it must be brought on the admiralty side.

Trihey v. Transocean Air Lines, Inc., C.C.A. 9, 1958, 255 Fed. (2d) 824, likewise was a *passenger* case. The trial court heard the evidence, found no negligence had been shown, and decided in favor of the defendant. The question on appeal was whether this finding was permissible under the evidence; the Court of Appeals held it was, and affirmed.

D'Aleman v. Pan American World Airways, C.C.A. 2, 1958, 259 Fed. (2d) 493, again was a *passenger* case, in which the complaint alleged the decedent had been so frightened by an incident that occurred in flight over the ocean that several days later, after reaching land, he died. The complaint had two counts, the first under the Death on the High Seas Act, and the second under the Virginia wrongful death act. On the first count, the trial court itself heard the case, found no negligence had been shown, and decided in favor of the defendant. The second count was tried to a jury, which likewise decided in favor of defendant. On appeal, the sole question as to the first count was whether it should have been tried to a jury, instead of to the court in admiralty. The appeal as to the second count concerned only alleged erroneous rulings on the admissibility of evidence. The Court of Appeals affirmed as to both counts, holding that the first count had properly been tried in

admiralty to the court on the theory that the Death on the High Seas Act governed occurrences during flight over the ocean, as well as upon the ocean, and that actions thereunder must be brought in admiralty. A brief concurring opinion by Judge Waterman added the view (in which his fellow Judges apparently did not join) that "the Congress in enacting 46 U.S.C.A. § 761 superseded the State created causes of action for wrongful death arising from events occurring on the high seas" (259 Fed. (2d) 469) citing in this connection *Wilson v. Transocean,* 121 Fed. Supp. 85.

It seems obvious that (save for the summary reference in Judge Waterman's concurring opinion to the *Wilson* case, discussed below at pages 30-33 of this Brief) that none of these cases is remotely in point, factually or legally.

The two treatise references are equally not in point, as will be demonstrated on pages 34-35 of this Brief.

We are thus left in the position, as Appellee, with the duty to respond to Appellant's case, but with little or nothing to respond to. Since this is our one opportunity to present written argument, however, we must anticipate and answer such arguments as Appellant's counsel may present in their Closing Brief. We anticipate that there Appellant's counsel will cite the case of *Fernandez v. Linea Aero Postal Venezolana,* U.S.D.C., S.D.N.Y., 1957, 156 Fed. Supp. 94,[1] and therefore now discuss it briefly.

The *Fernandez* case involved the death of a stewardess in an airplane crash at sea, and held a claim could be founded upon the Death on the High Seas Act; the case therefore superficially seems factually in point. The case is legally not in point at all, however, since it in no way dealt with or even considered the question whether such a remedy, if otherwise applicable, would be barred by a workmen's com-

1. Inasmuch as they specifically cited this case in the District Court.

pensation statute. The only issue before the court was instead the completely different question, presented on a preliminary motion, whether the United States Death on the High Seas Act applied in the case of a *foreign* airplane, with a *foreign* owner and crew, where the accident occurred outside the United States. (It is to be noted that the defendant was a Venezuelan airline, Linea Aero Postal Venezolana, and presumably so was the crew; the deceased stewardess in question was named Elvia V. Varela and her personal representatives were named Fernandez and Varela.) The District Judge held the United States Act *did* apply (a rather doubtful result in view of *Lauritzen v. Larsen,* 1953, 345 U.S. 571, 97 L.Ed 1254). Quite possibly the reason the effect of a workmen's compensation act remedy was neither posed nor considered is that Venezuela has no such act applicable with respect to such accidents.

Why Appellant's counsel in their Opening Brief chose to avoid the issue can only be guessed at. We must point out, however, that it was their burden, as Appellant, to demonstrate that the ruling of the District Court from which they appeal was erroneous. Their failure to come to grips with the reasoning of the trial court, or even to try to meet the issue, simply acknowledges, we suggest, the fundamental weakness of Appellant's position.

The California Workmen's Compensation Act: Its Extra-Territorial Jurisdiction and Exclusive Remedy Provisions

The California Workmen's Compensation Act is contained in Sections 3201 through 6002 of the California Labor Code. It applies to all injuries (including death) arising out of an employee's employment (Labor Code Section 3600), both where the injury occurs within the State of California, and also where the injury occurs outside the territorial boundaries of the State of California, if the contract of employment was entered into in California or

if the employee was regularly employed in California (Labor Code Sections 3600.5 and 5305).[2] As the Court is aware, such extra-territorial coverage is common, even customary, in State Workmen's Compensation Acts. Such extra-territorial jurisdiction has been uniformly sustained on the basis of a State's legitimate interest in protecting employees regularly employed within the State and their families from the consequences of industrial accidents. *Alaska Packers v. Industrial Accident Commission,* 1935, 294 U.S. 532, 79 L. Ed. 1044.[3] As the Court is undoubtedly

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2. Set forth at page 5 of this Brief.

3. The language used by the United States Supreme Court in the case of *Cardillo v. Liberty Mutual Insurance Co.*, 1947, 330 U.S. 469, 91 L.Ed. 1028, sustaining application of the extraterritorial jurisdiction provisions of the District of Columbia workmen's compensation act, is very much in point. In rejecting a challenge to these provisions, the Court said:

> "We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case * * *
>
> "Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents *and to place on District of Columbia employers a limited and determinate liability.* See Bradford Electric Light Co. v. Clapper, 286 US 145, 159, 76 L. Ed. 1026, 1035, 52 S Ct 571, 82 ALR 696. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and injuries occur solely within the District. *In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury.* Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case." (Emphasis added, 330 U.S. at 475-476.)

aware, thousands of American employees (many of whom were hired in California) now work in foreign countries, Arabia, Iran, India, South America and the like, on various construction and oil projects; these, it is understood by all, are protected as to industrial injuries by the applicable State Workmen's Compensation Act (very often that of California) rather than by Arabian or other "local" law.

Under the California Workmen's Compensation Act the employer is required to "secure" its employees' compensation rights by effecting compensation insurance with an insurance carrier (California Labor Code Section 3706).[4] Where the conditions and requirements of the Workmen's Compensation Act are present, and provided that the employer has complied with Section 3706 as stated above, the remedies against the employer for injury to or death of an employee are, by the express terms of the Act, made exclusive. The statutory language is found in Labor Code Section 3601 which reads as follows:

> "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in Section 3706, the exclusive remedy against the employer for the injury or death."

As is well known, the Legislature, in enacting the California Workmen's Compensation Act, both extended and contracted the rights of employees against their employer. A comprehensive system of compensation for industrial injuries was provided, without any requirement of proof of fault; on the other hand, all "common law" rights of action by the employee against the employer for fault were expressly abrogated. Each of these two features of the Act is vital to it; each complements the other. Save for

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4. Which Pan American did. See Stipulation of Facts, Paragraph (4) (Tr. 17).

the single case where the employer, in violation of law, fails to "secure" compensation for its employees by effecting compensation insurance, the employer, in exchange for imposition of the obligation to pay compensation under the Act, is relieved from any other claims or causes of action by or on behalf of the employee. The exclusive remedy provision of the Act is thus a key and integral part of the statutory scheme; to hold that the exclusive remedy feature of the California Workmen's Compensation Act is inapplicable to a given situation is to hold that the Act in its entirety is inapplicable.

As the Stipulation of Facts states, the Industrial Accident Commission found it had jurisdiction over the death of decedent King, and that the California Workmen's Compensation Act applied. That finding (upon a *contested* issue, see Stipulation of Facts, Paragraph 6, Tr. 18) has become final and is therefore *res judicata.* Libelant is now estopped to deny the jurisdiction of the Industrial Accident Commission or the correctness of its findings, *Sherrer v. Sherrer,* 1948, 334 U.S. 92 L.Ed. 1429. Libelant therefore cannot assert that the California Workmen's Compensation Act is inapplicable, or any proposition tantamount to such an assertion.

The Legal Background of the Law of Airline Industrial Injuries: Congress Has Left the Provision and Regulation of Remedies for Airline Industrial Injuries Wholly to the Respective States. When an Airline Industrial Accident Occurs, the Workmen's Compensation Act of the State of Employment Governs and Controls Over and Against the Wrongful Death Law of the Place of the Accident.

To present the present issue in its proper legal setting, some background concerning the rights and remedies of airline employees against their employers for industrial injuries (including death) is necessary.

There are two fundamental legal propositions of significance here:

(1) There is *no* applicable Federal remedy for industrial injuries of airline employees, either of the Workmen's Compensation or the F.E.L.A. Act kind;

(2) The applicable *State* Workmen's Compensation remedies do apply, and provide and regulate the remedies of airline employees against their employers with respect to industrial injuries.

It is common knowledge that nowadays commercial airliners fly all over the world, and that the typical trip covers a great distance. As for trips within the United States, almost every flight of a modern passenger airliner crosses one or more State boundaries. Hundreds of flights a week likewise take place between the continental United States and Europe, Asia, Africa and South America. These flights pass over both land and ocean, but are always from a land airport to a land airport (save in the almost vanishing instance of "flying boats").

Due to the interstate and foreign nature of such airplane flights, it is clear, as a theoretical matter, that Congress *could* exercise jurisdiction, under the Constitution, to enact a Federal compensation act applicable to airline employees, comparable to the specific Federal laws enacted as to railroad workers, seamen, longshoremen, and others. It is equally clear, however, as a matter of actual practice, that Congress has seen fit *not* to exercise its potential jurisdiction over airline employees, but has instead left to the States, and solely to the States, the question of the respective rights and remedies of airline employees and their employers for industrial injuries. This is clear, both as a matter of common knowledge and also of authority. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.*, U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving

a wrongful death action for the death of a flight engineer killed in an airplane crash in Newfoundland, the court said (at page 347):

> "* * * no rule of liability or method of compensation has been established by Congress with respect to personal injuries sustained by employees of airplane carriers engaged in interstate or foreign commerce."

In view of the importance of air transportation to our modern life, and the specific recognition given the airline industry by Congress in various respects (such as Congressional investigation into overlapping use of the national air lanes by the military services and civilian airlines, and the application of the Railway Labor Act to labor disputes in the airline industry) the complete and utter silence of Congress upon the subject of airline employer-employee rights and remedies in respect to industrial injuries, can only be deemed intentional and deliberate.

In approaching the issue in the present case, therefore, we must bear in mind that, with respect to the *typical* industrial airline injury occurring on land, whether within or without the United States, Congress has provided *no* Federal remedy but has intentionally and knowingly left the field to State regulation and State regulation alone.[5]

The second fundamental proposition to observe, in the field of airline industrial injuries, is that the applicable Workmen's Compensation Act has uniformly been held to govern and control, as against the *lex delicti,* the tort law

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5. The fact that Congress has intentionally and knowingly left this area to the States is illustrated by the fact that both in the 84th and 85th Congresses bills were introduced in the House of Representatives, the effect of which would have been to specifically make airline employees subject to the Federal Employers Liability Act and these bills failed even to get out of committee. See H.R. 4831 introduced in the 84th Congress, and H.R. 1044 introduced in the 85th Congress, both by Congressman Zelenko.

of the place of the injury which would otherwise normally apply. The applicable Workmen's Compensation Act has been held to govern because that is the law with relation to which the parties contracted, and that is the law which affords at once a speedy and certain remedy to the injured worker (or, in the case of death, to his family) and thus protects both the interest of the worker and the State. The cases are uniform to this effect, whether the crash causing the injury occurs within the United States or upon overseas territory.

First, as to crashes within the United States: In *Willingham v. Eastern Air Lines,* C.C.A. 2, 1952, 199 Fed. (2d) 623, suit was brought in New York for the death of an airplane pilot killed in a crash in Maryland. The widow had claimed and received compensation under the Georgia Workmen's Compensation Act. The court held that the Georgia Workmen's Compensation Act applied and that the wrongful death action based upon Maryland law was barred by the exclusive remedy provisions of the Georgia Act.

In *Severson v. Hanford Tri-State Air Line, Inc.,* C.C.A. 8, 1939, 105 Fed. (2d) 622, the plaintiff was a co-pilot on a commercial airplane flying between Minnesota and Illinois, and was injured in a crash in *Wisconsin,* allegedly due to his employer's negligence. He brought a common law action for damages based on negligence against the employer. The trial court directed a verdict for defendant on the ground that plaintiff's sole remedy was under the *Minnesota* Workmen's Compensation Act, and the Circuit Court of Appeals affirmed, stating:

> "It is conceded that plaintiff suffered an accidental injury arising out of and in the course of his employment. The Workmen's Compensation Acts of the various states were enacted for the purpose of requiring

industry to bear a part of the burden occasioned by accidental injuries to its employees, when such injuries arose out of and in the course of employment. It is important to determine the location of the industry. If the industry in which plaintiff was employed was in fact located in Minnesota, he was entitled to the protection of the Minnesota Workmen's Compensation Law, even though his injuries were received in another state, if the work he was doing was a part of the industry being carried on in the State of Minnesota, or was incident thereto." (Pages 624-625)

* * * * * * *

"We think it clear that the plaintiff was employed in a business or industry localized in Minnesota, and *hence his right to compensation for injuries received during his employment must be determined exclusively under the Workmen's Compensation Act of that State. He could not, therefore, maintain a common law action for damages predicated upon negligence.* The judgment appealed from is affirmed. (Emphasis added, page 625.)

See also *Duskin v. Pennsylvania Central Air Lines,* C.C.A. 6, 1948, 167 Fed. (2d) 727.

The same rule applies to injuries or death resulting from crashes occurring in foreign countries. Thus, in *Spelar, Administratrix v. American Overseas Air Lines, Inc.,* U.S.D.C., S.D.N.Y., 1947, 80 Fed. Supp. 344, involving a wrongful death action brought for the death of a flight engineer killed in an airplane crash in Newfoundland, the court held that the New York Compensation Act was applicable, and that the wrongful death action otherwise available under Newfoundland law was barred by the exclusive remedy provisions of the New York Compensation Act. In *Urda v. Pan American Airways,* C.C.A. 5, 1954, 211 Fed. (2d) 713, a personal injury action was brought by an airline steward for injuries received in a crash in Brazil. The court

held that the Florida Workmen's Compensation Act governed, and that that Act barred any actions based on Brazilian law.

It is important to note that these cases sustaining the paramount and controlling nature of the applicable State Workmen's Compensation Act were decided, *not* upon the theory that there was *no* local wrongful death act (that is, local to the place of the crash) or that the local wrongful death statute was for some reason intrinsically defective and invalid, nor even upon the theory that such local statutes would not apply to foreign airplanes merely passing over the local territory. These cases were instead decided upon the basis that where *both* the applicable Workmen's Compensation Act and the local wrongful death act would otherwise apply, it was the former which governed and controlled, and which afforded the sole and exclusive remedy; that is, the Workmen's Compensation Act excluded the operation of the *otherwise applicable* wrongful death act.[6]

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6. The preferred status of workmen's compensation remedies over tort remedies in general is exemplified by the two recent United States Supreme Court decisions of *Feres v. United States*, 1950, 340 U.S. 135, 95 L.Ed. 152, and *Johansen v. United States*, 1952, 343 U.S. 427, 96 L.Ed 1051. The *Feres* case held that a soldier's sole remedy against the United States for personal injuries lay in the compensation-type remedies available to servicemen, and that resort could not be had to the Federal Tort Claims Act. The *Johansen* case held that the Federal Employees Compensation Act was the exclusive remedy for injuries sustained by a civilian member of the crew of an Army transport and that resort could not be had to the Public Vessels Act for a tort recovery. In each case the result was reached although there was *no* specific "exclusive remedy" provision and the language of the "tort" statute relied upon was general in nature, and literally applicable.

See also to the same effect the recent Court of Appeals (D.C.) case of *Aubrey v. U. S.*, 1958, 254 Fed. (2d) 768, an opinion by Justice Reed, holding that the District of Columbia workmen's compensation act precluded an employee of a Navy officer's open mess from suing the United States under the Federal Tort Claims Act.

To sum up, then, in stating the legal background for the present case, we believe it is clear beyond dispute that the paramount and exclusive nature of the applicable Workmen's Compensation Act *would* control:

(1) If the airplane crash had occurred in California;

(2) If the airplane crash had occurred in any other State of the United States;

(3) If the airplane crash had occurred in any foreign country.

Under any of the above situations, if an airline employee were injured, he would receive a State Workmen's Compensation remedy, and that only; if he were killed, his family would receive death benefits under the State Workmen's Compensation Act, and those benefits only.

The question presented in the District Court in this case was: What was the result if an airline crash occurred—not over land—but over or upon the ocean:—

(1) Did the same law (the applicable State Workmen's Compensation law) govern *which would govern in the case of any other accident;* or

(2) Did an entirely new and different law all of a sudden apply, with entirely different legal rules both as to the determination of liability and of damages?

It was the contention of Pan American that both under the statutory and case law, and as a matter of common sense and practicality, the same law of industrial injuries that would apply to any other airline accident applied to an airline accident occurring on or over the high seas; it was the contention of Libelant that an entirely new and different law applied, purely due to the fortuitous location of the scene of the accident.

The District Court, in a well-reasoned opinion, sustained the contention of Pan American.

The Same Principle Which Governs Elsewhere, the Paramount Nature and Exclusive Effect of the Workmen's Compensation Remedy, Applies in the Instant Case. The Situation Is Not Changed by the Fact a Federal Remedy Might Exist in the Absence of Any State Compensation Remedy.

In their Opening Brief, Appellant's counsel quote Sections 1 and 2 of the Federal Death on the High Seas Act (46 U.S.C.A. Sections 761-767), cite the cases previously discussed which sanctioned *passenger* claims arising out of airline crashes at sea to be brought under that Act, and—without further citation of authority or reasoning, and totally ignoring the reasoning of the District Court and the authorities cited in its opinion to the contrary—assume they are thereby entitled to prevail.

As previously noted, we believe it is not too much to say that in their Opening Brief Appellant's counsel have avoided, seemingly intentionally, the only issue in this case. As very clearly appears from Judge Goodman's opinion, the issue is *not* whether the Death on the High Seas Act applies to *passengers,* nor even whether it would apply to airline flight personnel in the *absence* of an applicable State Workmen's Compensation Act; the issue instead is whether the Death on the High Seas Act is applicable to industrial injuries or deaths of such personnel which *are* covered by a State Workmen's Compensation Act.

At first blush, the thought comes to mind that the existence of *any* Federal remedy will control and, if necessary, supersede any otherwise applicable State statute, on the theory that this result is compelled by the Supremacy Clause of the Constitution. This, however, is not correct. (We of course concede that a valid Act of Congress which *intends* to supplant State legislation dealing with the same subject does in fact supplant and supersede such State legislation, if such intention is either expressly or impliedly

made clear; as will be shown hereafter, however, this is not the situation here.)

This is made clear by the line of cases, cited in Judge Goodman's opinion, which the United States Supreme Court decided in the 1920's.[7]

The first of these, *Grant Smith-Porter Ship Co. v. Rohde,* 1922, 257 U.S. 469, 66 L. Ed. 321, dealt with a workman injured while at work on a partially completed ship lying at dock in a river near Portland, Oregon. The Oregon Workmen's Compensation Law (applicable unless specifically waived, which had not been done) purported to apply to shipbuilding. The workman sued the employer for negligence in the Federal Admiralty Court. The Ninth Circuit Court of Appeals certified to the United States Supreme Court two questions: (1) whether the general admiralty jurisdiction of the Federal Court would normally extend to the accident in question; and (2) whether such admiralty right of action would be abrogated by the State Workmen's Compensation Act. The Supreme Court discussed the facts and then stated:

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *
>
> "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, *we answer yes.*

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7. By essentially the same court, it is interesting to note, which decided *Southern Pacific Co. v. Jensen,* 1917, 244 U.S. 205, 61 L.Ed. 1986.

"Assuming that the second question presents the inquiry whether, in the circumstances stated, *the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes.*" (257 U.S. at pages 477-478; emphasis added.)

Millers' Indemnity Underwriters v. Braud, 1926, 270 U.S. 59, 70 L. Ed. 470, dealt with the accidental death of a diver employed by a shipbuilding company, killed while submerged from a floating barge. The State Court sustained a compensation award under the Workmen's Compensation Law of Texas. (Coverage under the Texas Workmen's Compensation Act was compulsory, not elective.) The employers and its compensation carrier appealed, insisting:

"* * * that the claim arose out of a maritime tort; that the rights and obligations of the parties were fixed by the maritime law; and that the State had no power to change these by statute or otherwise." (270 U.S. at 63)

The United States Supreme Court discussed its prior decision in the *Rohde* case and then said:

"In the cause now under consideration the record discloses facts sufficient to show a maritime tort *to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act;* but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*" (270 U.S. at pages 64-65; emphasis added.)

In *Alaska Packers Association v. Industrial Accident Commission,* 1928, 276 U.S. 467, 72 L. Ed. 656, a workman

for a fish cannery in Alaska (who had been hired in California) was injured while endeavoring to push into navigable water a stranded fishing boat. An Industrial Accident Commission award was challenged:

> "* * * upon the sole ground that when injured he was doing maritime work under a maritime contract and that the rights and liabilities of the parties must be determined by applying the general rules of maritime law, and not otherwise." (276 U.S. at page 469.)

The Court, in reply, said:

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. *Even if an affirmative answer be assumed,* the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law." (276 U.S. at page 469; emphasis added.)

There are two significant propositions to be drawn from the above cases:

(1) The Court did *not* hold that an admiralty remedy would normally *not* apply to the fact situations existing in these cases; on the contrary, in each case it held that (absent a State Workmen's Compensation Act) the general admiralty jurisdiction *would* apply.

(2) The Court did *not* hold that a rule of absolute uniformity was compulsory within the admiralty jurisdiction, and that variation created by State law was not permis-

sible;[8] on the contrary, it held that State law might apply (and *would* be applied by the court) save where it would (in the words of the court in the *Alaska Packers* case, at page 469) "interfere with the *essential* uniformity of the *general maritime* law." (The same thought was expressed in the *Rohde* case (at page 477) where the court stated that local law could not "*materially* affect any rules of the *sea* whose uniformity is *essential*" and in the *Rohde* case (at page 64) that local law was invalid only where it would work "*material* prejudice" to a "*characteristic* feature" of the "*general maritime* law".

We believe these cases furnish a decisive answer to any contention by counsel for Appellant that the existence (in the *absence* of an applicable State Compensation Act) of a Federal remedy immediately and at once acts to exclude and render ineffective a State Compensation Act that is applicable. Such was certainly not the holding of the United States Supreme Court in the cited cases; on the contrary, they held in each case that the *State* Compensation Act was effective to exclude *the otherwise applicable Federal* remedy.

We believe the instant case falls well within the rule of these cases. In the words of the Supreme Court in *Grant Smith-Porter Ship Co. v. Rohde* (discussed at pages 20-21 above):

> "Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential * * *"

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8. Even in the original *Jensen* case, Justice McReynolds stated (244 U.S. 205 at 216, 61 L.Ed. at 1098): "* * * it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation. *That this may be done to some extent cannot be denied* * * *" (Emphasis added).

The employment here involved was simply not "maritime" nor connected directly nor indirectly with navigation or seaborne commerce, the traditional subjects of the "general maritime law". There is no present and existing "uniformity" or even similarity (certainly not an "*essential*" uniformity) between either the legal or factual positions of the traditional maritime employments, and the employment of the airline flight personnel here involved.

If there were in fact an "identity", or even a "family relationship" between traditional maritime employments, on the one hand, and airline employees on the other, Congress would undoubtedly have *assumed* jurisdiction over the field of industrial injuries of airline employees, and have passed a law assimilating the rights and remedies of such employees for industrial injuries to those of maritime workers and seamen, such as the Federal Longshoremen's Act or the Jones Act. This Congress has not done. This intentional failure to act is powerful evidence that, certainly in the eyes of Congress, there is no "essential uniformity" in legal treatment to be preserved between these two widely differing industries, the most ancient form of transportation on the one hand, and the most modern on the other, operating in two completely different media.

The employment, duties, skills, working conditions, interests, problems and general situation of airline crews flying across land and ocean are completely dissimilar and unrelated to those of seamen engaged in traditional maritime pursuits. True "uniformity" could not be created, let alone preserved, by treating airline crews like seamen. The true uniformity and identity which in fact exists is that between airline flights over oceans and airline flights over land; the uniformity in legal treatment that should exist is between those two situations. To make the respective rights and duties as between the crew members of a commercial

airliner and their employer radically vary depending on whether a particular flight is over land or over ocean (which might even vary upon the particular choice of routes between the same two points or, even more anomalously, in the case of an "ocean" flight (which is in fact always a flight over both land and ocean) would vary depending upon whether trouble developed over the over-land or over-ocean portion of the flight) would be not to preserve and protect an existing "uniformity," but would rather completely destroy uniformity and instead weave a crazy-quilt pattern into the law of industrial injuries of the airline industry.

It would create only confusion and arbitrary and unexpected consequences for both airline employees and employers to hold that, while Workmen's Compensation governed in the case of all industrial injuries arising on or over land, in the case of injuries or death occurring upon or over the water Workmen's Compensation was inapplicable and recovery for industrial injuries in such latter (and exactly equivalent) situation could be had only upon proof of fault. Where no fault of the employer was involved (and, in view of the high standard of care used in the aviation industry and the various natural hazards of air transportation, this would usually be the case)[9] there would be no recovery at all, either for an injured employee or, in the event of death, for his dependents. Even if it be assumed that fault on the part of the employer was present, in the nature of the case this would be difficult or impossible for the claimant to establish and there again recovery would be defeated. Even where negligence could be shown and a re-

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9. In this connection the cases cited in Appellant's Opening Brief are very much in point. Both the *Trihey* case and the *D'Aleman* case affirmed trial court rulings in favor of the *defendants*, on the ground *that no negligence had been shown*. In addition, any plaintiff would face the barrier to recovery discussed on pages 39-40 of this Brief.

covery secured, this would occur only after prolonged litigation. Prompt payment of the medical and indemnity benefits provided under a Workmen's Compensation Act would be conspicuously absent. So anomalous a result, with such unexpected consequences, should be avoided if it is possible to do so.

The Existence of the Federal Death on the High Seas Act Does Not Change the Situation. The Intention of Congress Was Merely to Remedy a Defect in the Common Law and Not to Displace or Affect State Remedies, Particularly State Workmen's Compensation Acts. This Is Shown by: (a) the Language of the Act, (b) the Legislative History of the Act, (c) the Cases.

Libelant's counsel will undoubtedly seek to distinguish the United States Supreme Court cases cited in the previous section on the ground that those cases dealt with an admiralty remedy *not* specifically created by statute, and the Libelant here is relying upon an express act of Congress, the Death on the High Seas Act.

The question thus presented, therefore, is whether or not it was the intent of Congress in enacting the Death on the High Seas Act to displace and supersede State workmen's compensation remedies which would otherwise govern. The intent of Congress may be sought by examining: (a) the language of the Act, (b) the legislative history of the Act, and (c) cases construing the Act. The fact that Appellant's counsel have chosen to discuss neither the language of the Act, nor its legislative history, nor cases construing it in this respect (save for a left-handed reference to *Wilson v. Transocean,* possibly not directly cited because it was so clearly and decisively distinguished by its author, Judge Goodman, in his opinion in the instant case) suggests, as proves to be the case, these sources help only Appellee.

(a) The Language of the Act Suggests No Intent to Displace State Compensation Remedies.

The language of the Death on the High Seas Act contains nothing expressly purporting to supersede State workmen's compensation remedies. Indeed, the exact reverse is true. Section 7 of the Act (46 U.S.C.A. Section 767) reads as follows:

"**Exceptions from Operation of Chapter.**

"The provisions of any State statute giving or regulating rights of action or remedies for death *shall not be affected* by this chapter * * *" (Emphasis added.)

The California Workmen's Compensation Act and its exclusive remedy provision are "provisions" of a "State statute * * * regulating * * * remedies for death * * *". To deny it effect would be to "affect" it to the extreme degree; it would be in effect to *repeal* it.

The language is so clear that we believe, if we wished, we could well stop here.

(b) The Legislative History Does Not Indicate Any Intention to Displace State Workmen's Compensation Acts.

The Death on the High Seas Act was passed by the 66th Congress and became law on March 30, 1920. The bill was debated in the House of Representatives on March 17, 1920; the report of the debate appears in 59 Congressional Record, pages 4482-4487. A study of that debate, we submit, reveals two propositions very clearly:

(1) The sole purpose of the bill was to remedy a defect of the common law, whereby a defendant who had negligently injured another, and was liable for said injuries if the victim lived, escaped liability altogether if the victim died. On land, this defect had been remedied by statute by most State legislatures, but the common law rule had not been changed in admiralty. This anomaly in admiralty law

was vivid in the mind of the Congress, in view of the litigation arising out of the then-recent sinking of the Titanic. The purpose of the Act was to remove this anomaly of the common law and permit recovery in the event of death under the same circumstances which would have governed had the decedent survived. It seems safe to say that had there been no such anomaly of the common law, there would never have been a Death on the High Seas Act.

(2) It was the intention of Congress not to displace or disturb State remedies. This was made very clear by the circumstances which led to the offering and adoption of an amendment by Congressman Mann. As originally proposed, the bill *would* by implication have superseded State remedies. Congressman Mann specifically objected to this and proposed an amendment deleting the language which would have led to this result. The amendment, although opposed, was adopted.

Pertinent portions of the legislative history, which clearly demonstrate the above two propositions, appear in the Appendix to this Brief.

With respect to the question whether the Act was intended to supersede State workmen's compensation remedies, it is pertinent to note that the Congress which enacted the Act in 1920 was friendly, not hostile, to the maximum possible application of State workmen's compensation acts. As appears in the Congressional debate quoted in the Appendix, the Act had been under consideration for several years or more before its enactment by the 66th Congress. The case of *Southern Pacific Co. v. Jensen* (referred to at page 20 of this Brief above) holding (in a situation where Congress had not specifically spoken) that State compensation acts could not validly apply to traditional maritime employments insofar as uniformity was essential, was

decided on May 21, 1917. On October 6, 1917, the 65th Congress passed a law amending the Judiciary Act so as to specifically provide there was preserved "to claimants the rights and remedies under the workmen's compensation law of any State". (Act of October 6, 1917, Chapter 97, 40 Stat. at L. 395.) This was the posture of the law on March 30, 1920, when the Death on the High Seas Act became law. Thereafter, when the United States Supreme Court subsequently held (5-4, reversing the New York State Courts) that this law was unconstitutional insofar as it was held to permit a New York State workmen's compensation law to be applied to a bargeman who was injured while "doing work of a maritime nature" *Knickerbocker Ice Co. v. Stewart*, 1920, 253 U.S. 149, 64 L. Ed. 834, the 67th Congress promptly passed the Act of June 10, 1922, Chapter 216, 42 Stat. at L., 634, which again sought to authorize jurisdiction of the State workmen's compensation laws to the maximum possible extent. (This Act was subsequently held unconstitutional, as applied to stevedores "whose employees work only on board ships in the navigable waters of Puget sound" (264 U.S. 221) in *Washington v. Dawson & Co.*, 1924, 264 U.S. 219, 68 L. Ed. 646.)

We submit that these Acts of the 65th and 67th Congresses (held invalid as to particular fact situations upon grounds not relevant to our case, see discussion at pages 20-24 of this Brief) constitute persuasive evidence as to the general attitude of the 66th Congress with respect to State workmen's compensation acts, at the time it considered and enacted the Death on the High Seas Act.

We think the foregoing makes it overwhelmingly evident that Congress, in enacting that Act, had neither a specific nor a general intent to displace or in any way affect workmen's compensation acts, but rather that both the general and specific intent of Congress was to the contrary.

(c) Neither the Holdings Nor the Reasoning of the Decided Cases Indicate That the Death on the High Seas Act Superseded State Compensation Remedies.

The citation by Appellant's counsel of Judge Waterman's concurring opinion in the *D'Aleman* case (*supra,* pages 8-9) suggests that their ultimate reliance will be placed on several cases which hold that the Death on the High Seas Act displaces State wrongful death acts, the leading of which is *Wilson v. Transocean Air Lines,* U.S.D.C., N.D. Cal., 1954, 121 Fed. Supp. 85. It is significant, therefore, that the author of the *Wilson* opinion, Judge Louis Goodman, found the ruling therein totally inapplicable in the instant case.

In the *Wilson* case Judge Goodman expressed the opinion (121 Fed. Supp. at pages 90-91) that the enactment of the Federal Death on the High Seas Act superseded the operation of State *wrongful death acts* upon the high seas. (This statement was, under the facts posed in the *Wilson* case, arguably dictum, since, as appears in footnote 32 on page 93 in the opinion, the California Wrongful Death statute (upon which plaintiff relied) did not in any event purport to extend to the high seas or go beyond the territorial boundaries of California; and it was upon this basis that the defendant in the *Wilson* case argued it was inapplicable.) Although considering the contrary intendments of the Mann amendment, Judge Goodman arrived at his conclusion in view of various considerations, including the possible conflict arising from two statutes, State and federal, of the same general scope and character occupying the same area, and the desirability of avoiding constitutional questions which might otherwise arise under the *Jensen* doctrine.

It is very clear that the *Wilson* opinion dealt only with the effect of the Act upon State *wrongful death acts.* Judge

Goodman's language was carefully limited in this regard, as indicated by the following extracts:

> "So, while the Mann amendment provides a strong argument that the Death on the High Seas Act does not supersede *state wrongful death statutes* on the high seas, the argument is not so strong but what it is overcome by other considerations."
>
> * * * * * * *
>
> "Moreover, any attempt to apply a *state wrongful death statute* to a death occurring on the high seas, would, today, raise a serious constitutional question." (Page 90)
>
> * * * * * * *
>
> "Finally, in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the *state wrongful death statutes* as to actions for death occurring on the high seas." (Page 91, emphasis added.)

Not only the language but the reasoning likewise is limited to the case of State wrongful death acts. The arguments Judge Goodman cites in this connection are persuasive. It is not unreasonable to hold that a valid Congressional enactment upon *the very same subject* demonstrates a Congressional intent to supersede comparable State statutes. The Death on the High Seas Act is cast in the form of a typical wrongful death statute, and is couched in the most general terms, appropriate to such a statute. It is therefore not unreasonable to hold that State *wrongful death statutes* (couched in the same general terms, addressed to the same situation, with the same general solution) are superseded by the Act to the extent they purport to operate within the same area. (Moreover, State wrongful death statutes in general do not purport or intend to apply outside the State's own boundaries. There is no legal nor logical reason to apply State wrongful death acts outside

a State's boundaries, in contrast to State workmen's compensation acts, where extra-territorial jurisdiction *is* essential if their purposes are to be fulfilled. See page 10 of this Brief.)

As noted by Judge Goodman in his opinion in the instant *King* case, none of the factors which suggest the Act supersedes State *wrongful death statutes* are relevant in the case of State *workmen's compensation acts,* particularly as to workmen's compensation acts as applied to airline personnel flying over the high seas. The Death on the High Seas Act is not at all of the same type and character as the State compensation acts and is in no way directed at the specific problem (the regulation of the respective rights and remedies between airline employees and their employers) with which they deal. (The situation would, of course, be quite different were we considering an Act of Congress specifically regulating the respective rights and remedies of airline employees and their employers as to industrial injuries. The case would then resemble the situations presented by the F.E.L.A. Act and the Jones Act, where Congress has specifically dealt with the regulation of rights and remedies for industrial injuries in particular specified employments. As noted above, however, the Death on the High Seas Act was not framed at all with a view to regulating industrial injuries in a specific field of employment, but was merely to remove an anomaly in the general field of personal injury law.)

Likewise, as noted in Judge Goodman's opinion, and at pages 24-25 of this Brief, there is no possible conflict with the *Jensen* doctrine since airline personnel are *not* a traditional subject of maritime law, and to permit State workmen's compensation acts to apply to them would in no sense "interfere with the *essential* uniformity" of maritime law, since they are not a subject of maritime law to start with. Indeed, as Judge Goodman points out: "The decedent

was employed in a *non-maritime* industry and performed *no maritime work*. Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of the accident." (Tr. 36, 166 Fed. Supp. at page 139.)

In short, as Judge Goodman held, the judgment in this case is in no way inconsistent with the construction of the Act in *Wilson v. Transocean Airlines* and the cases following the *Wilson* case.

Moreover, it is interesting to note that Judge Denman, writing for the Court of Appeals for the Ninth Circuit in the *Higa* case (decided subsequent to the *Wilson* case) expressed the view that even State wrongful death acts were not superseded by the Act. In that case Judge Denman reviewed the legislative history and discussed the Mann amendment. (It will be recalled (see Appendix) that the purpose of the amendment, in the words of its author, Congressman Mann, was "so that the Act will not take away any jurisdiction conferred now by the States.") Judge Denman noted trenchantly: "Congress agreed with Mann * * *" (230 Fed. (2d) at pages 782-783). (The actual holdings of the *Higa* and *Wilson* cases are of course consistent; the issue in each was whether a cause of action founded on the Death on the High Seas Act had to be brought in admiralty, and each case held that it did.

Thus whether the language of section 7 is to be read literally, as suggested by Judge Denman in the *Higa* case, or as subject to an implied exception as to State wrongful death acts by reason of constitutional questions otherwise created by the *Jensen* doctrine, as suggested in the *Wilson* case, this language must be given effect as to State workmen's compensation acts, at least insofar as they pertain to industrial accidents occurring in airline operations over the high seas, the contact of which with maritime matters is at most fortuitous and tangential.

We believe the foregoing shows the decided cases afford cold comfort for Appellant's contention in this case.

The only remaining authorities to be considered are the two treatises briefly cited in Appellant's Brief, namely, *Restatement of Conflicts of Laws,* Section 401, Comment c, and Hanna, *The Law of Employee Injuries and Workmen's Compensation.*

The language quoted by Appellant's counsel from Comment c to Section 401 of the *Restatement of Conflicts* (that State Workmen's Compensation Acts cannot be "constitutionally allowed * * * if the case is one which is within the scope of a Federal Employers Liability Act, or of admiralty jurisdiction") seems clearly read out of context. Section 401 appears in Topic 3 of Chapter 9 of the *Restatement* (Section 398-403) under the title: "Workmen's Compensation". The language quoted, in referring to "admiralty jurisdiction" seems clearly to refer to remedies provided under admiralty law to employees against their employers (the Jones Act, the analogue of the F.E.L.A.; maintenance and cure; and the warranty of seaworthiness) and seems clearly founded upon the cases holding that such acts of Congress, expressly regulating industrial injuries for certain specified employments, supersede State laws in the same area. Unless this language (which is neither clarified nor explained in any other part of Section 401, or elsewhere in the Restatement) is so construed, it is flatly inconsistent with the United States Supreme Court cases cited by Judge Goodman in his King opinion and at pages 20-23 of this Brief; it is hardly to be assumed that the authors of the *Restatement* intended such a conflict.

The sentence quoted by Appellant's counsel from Hanna, *The Law of Employee Injuries and Workmen's Compensation* does appear at page 488 thereof (though the author cites no cases in support of this statement, and it does not

specifically refer to airline employees). The statement, however, is of course completely consistent with the opinion of Judge Goodman in the instant case, which specifically noted that, in the absence of the State workmen's compensation act, a remedy under the Death on the High Seas Act would be available. The language quoted from Hanna does not even begin to deal with the only issue in this case, namely, the effect of a workmen's compensation act upon the Death on the High Seas Act.

It can thus be seen that any argument that the enactment of a "specific" act of Congress makes the situation of this case very different from that presented in the line of cases discussed at pages 20-24 of this Brief is completely without merit. That argument, when analyzed, must ultimately rest on a contention as to the presumed intent of Congress. The intent of Congress, however, as manifested in the express language of the Act and its legislative history, particularly in the setting of the times and in the light of the purpose of the Act, is clearly to the contrary.

On Any Theory the Liability Imposed by the Death on the High Seas Act Is a Purely Derivative Liability, and Requires for Its Imposition That the Defendant Be One "Which Would Have Been Liable if Death Had Not Ensued". Pan American Would Not Have Been Liable to John Elvins King if Death Had Not Ensued, and the Act Therefore Has No Application in This Case.

As noted above, we anticipate that Libelant's counsel will contend that, even though a non-statutory admiralty remedy might be superseded by a State compensation act, the contrary occurs where there is an express Federal statute and that that statute (omitting Section 7 thereof, which Libelant's counsel will undoubtedly seek to disregard), solely controls. We believe that the foregoing sections of this Brief sufficiently dispose of such contention. Even if

our position in this regard is not accepted, however, there is another equally sufficient answer.

It is to be noted that the Death on the High Seas Act does *not* provide that there is to be a cause of action in *every* case where a death occurs on the high seas due to negligence; instead the Act provides that with respect to a death caused by wrongful act, negligence or default on the high seas, a cause of action is granted "against the vessel, person or corporation which would have been liable *if death had not ensued.*" The cause of action created lies only where the decedent might himself have recovered had he survived.[10]

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10. That this is a basic principle in this area of the law clearly appears in the leading text book, *Tiffany, Death by Wrongful Act,* 2nd Edition, 1913, published only seven years before the Death on the High Seas Act was enacted. Section 63 of that text reads as follows:

> "Sec. 63. *Act or Neglect Must Be Such that Party Injured Might Have Maintained Action.*
>
> "An essential limitation upon the words 'wrongful act, neglect, or default' is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a *condition* to the maintenance of the statutory action that an action might have been maintained by the party injured for the bodily injury. The condition has reference, of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect or default; and, although this condition has not been expressed in California, Idaho, Kentucky, and Utah, *no case has been found in which it has not been implied.*
>
> "*A preliminary question arises,* therefore, in *every* action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?" (Emphasis added, pages 132-133.)

The present vitality of this condition is illustrated by a quotation from the *Fernandez* case (discussed at Pages 8-9 above of this Brief) with respect to the very Act here in question:

> "The Death on the High Seas Act recognizes this distinction for it does not create a cause of action or grant a right of recovery for death in every situation but only against those defendants 'which would have been liable if death had not ensued' ". (156 Fed. Supp. 94 at 97)

The liability thus created is a derivative liability to remedy the gap or omission in the common law whereby a defendant, liable for personal injuries caused by his negligence, nevertheless escaped liability because the plaintiff died.

It is clear from the legislative history previously discussed (see the introduction of the discussion of the bill by the House Committee chairman, quoted in the Appendix) that the purpose of the Act was solely to remedy this anomaly of the common law, and to bring the maritime law into conformity with modern notions in this respect. (Virtually all States had by this time enacted wrongful death statutes.) The purpose was to prevent a tort feasor, otherwise liable by reason of his wrongful act, neglect or default, from escaping liability because the personal injuries inflicted proved fatal. This was achieved by, in substance, providing that the liability would continue to exist notwithstanding the death; the "person or corporation which would have been liable if death had not ensued" would still be liable. That the liability under the Act was intended to be merely the same liability which would have existed by reason of a defendant's wrongful act, neglect or default in the event death had not ensued, no more, no less, is shown by Section 5 of the Act, (46 U.S.C.A., Section 765) which provides as follows:

> "If a person die as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title *during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default,* the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title." (Emphasis added.)

The parallel structure is obvious. If an action is pending for personal injuries in respect of a wrongful act, neglect or default, and the plaintiff dies, the personal representative of the plaintiff is simply substituted and the suit may proceed under the Death on the High Seas Act. No problem is created because the liability being enforced is the same.

There is not even a hint, either in the legislative history or in the text of the Act, of any intention to impose liability for death where there would have been no liability for injury, or to disrupt and interfere with the scheme of State workmen's compensation acts (See 59 Congressional Record pp. 4482-4487).

It is clear that had King or the other air line personnel suffered only personal injuries from the accident in question they could *not* have sued Pan American on any theory of alleged negligence or wrongful conduct; their sole right would have been to compensation, payable, not on the basis of anyone's fault, but by reason of the industrial nature of the injury.

Even if in such a situation the airline personnel would have possessed a non-statutory admiralty remedy in the *absence* of an applicable State workmen's compensation act, the situation would be identical with those presented in the cases discussed at pages 20-24 of this Brief; that is, the exclusive nature of the State workmen's compensation act would control under the doctrine of the *Rohde* case. (In such a situation, involving personal injuries only, Libelant would be unable to try to distinguish those cases by citing the existence of an "express" Act of Congress, for there is none.)

As pointed out above, we believe that the situation of air line flight personnel is *sui generis,* and not properly to be assimilated with or even related to that of seamen

and others following traditional maritime pursuits. Even if the situation of air line personnel were in general assimilated to that of maritime workers, however, this would not help Libelant, for the reason that, (until the enactment of the *Jones Act* in 1920, specifically creating a remedy) the traditional admiralty rule was that a maritime worker, such as a seaman, could *not* sue his employer for injuries allegedly due to the employer's negligence, his sole remedies being maintenance and cure and the warranty of seaworthiness. Thus, in the leading case of *The Osceola,* 1903, 189 U.S. 158, 47 L. Ed. 760, a Court of Appeals certified to the United States Supreme Court the question whether the owners of a vessel were liable to a member of the crew for personal injuries sustained by him by reason of the master's negligent conduct in the navigation and management of the vessel. The Supreme Court, in a unanimous opinion, answered the certified question: "No", and held a seaman's remedies were limited to maintenance and cure and the warranty of seaworthiness, and that a seaman was *not* allowed to recover for the negligence of the master or any member of the crew.

This doctrine was re-enunciated in *Chelentis v. Luckenbach Steamship Co.,* 1918, 247 U.S. 372, 62 L. Ed. 1171, where the Court affirmed a nonsuit in a seaman's action for personal injuries allegedly due to negligence. The Court cited *The Osceola* and quoted with approval the language of the Court of Appeals below that

> "by virtue of the inherent nature of the seaman's contract the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case." (Pages 379-380)

It was for the express purpose of giving seamen a remedy against their employer for the latter's negligence

that the Jones Act was passed in 1920 and that act (46 U.S.C.A., Section 688) is expressly limited to *"seamen."*

It is of course clear that flight personnel of commercial air liners, even when flying over oceans, are not "seamen" and that the Jones Act is inapplicable to them. See *Stickrod et al v. Pan American Airways Co.,* 1941 U.S. Av. Reports 69, 1 Av. Cases 942.

If air line personnel, therefore, are assimilated to maritime workers, this means that before 1920 they had no remedy against their employer for personal injuries due to the latter's negligence and, being *unaffected* by the Jones Act, *that situation remains true right down to the present date.*

This reasoning, we confess, may seem artificial, but it merely underscores the artificiality of trying to assimilate air line personnel to, or to treat them as comparable with, maritime workers. It is our belief that the only remedy for personal injuries arising from an industrial accident to air line personnel flying over an ocean is the applicable State Workmen's Compensation Act; that an air line employer is not liable on any negligence theory; that it is therefore not a "person or corporation which would have been liable if *death had not ensued"*; and that in the case of death, therefore, the Death on the High Seas Act does not apply.

Conclusion

The foregoing has demonstrated that:

(1) At the time of the accident in question the decedent King was acting within the course and scope of his employment with Respondent Pan American; that the California Industrial Accident Commission awarded a death benefit to Libelant, and against Respondent and its workmen's compensation insurance carrier, with respect to King's

death; that said award was based on a contested finding as to jurisdiction, and has now become final, so that the determination is now *res judicata,* and Libelant is estopped to challenge it; that the California Workmen's Compensation Statute expressly bars any other remedy;

(2) With respect to all other industrial accidents (including deaths) arising out of air line operations the applicable State Workmen's Compensation Act governs and controls the rights of the employees and employer; that under the applicable Supreme Court decisions, such State Workmen's Compensation Acts may exclude Federal Admiralty remedies otherwise available, where to do so would not materially interfere with the "essential uniformity" of maritime law; that to apply State Workmen's Compensation Acts with respect to air line industrial accidents occurring while airplanes are in flight over the ocean would not materially interfere with any essential uniformity of admiralty law, since airline employment is factually and legally totally unlike the traditional maritime pursuits;

(3) The existence of the Federal Death on the High Seas Act does not change the situation, since the intention of Congress, as expressed in the language of the Act and its legislative history, was not to displace State remedies; that in any event, the Act would at most supersede only State wrongful death acts, and not workmen's compensation acts;

(4) On any theory the Death on the High Seas Act is inapplicable to the present situation, since that Act merely preserves rights of action which the decedent would have had against persons "if death had not ensued"; that the decedent King would have had no right of action against his employer, Pan American, for personal injuries, since the same would have been barred by workmen's compensation and since no admiralty recovery is granted an em-

ployee against his employer for the latter's negligence, save in the case of the Jones Act, which covers only "seamen"; that the Death on the High Seas Act is therefore inapplicable.

In view of the foregoing facts and legal authorities, we submit the District Court correctly decided that Pan American was entitled to judgment as a matter of law on the admitted facts. That judgment was correct, and should be affirmed.

Dated at San Francisco, California, on May 8, 1959.

Respectfully submitted,

Steinhart, Goldberg, Feigenbaum
& Ladar
John J. Goldberg
Neil E. Falconer

(Appendix Follows)

Appendix

Extracts from the Discussion in the House of Representatives on March 17, 1920 on the Proposed Death on the High Seas Act (59 Congressional Record, Pages 4482-4485, March 17, 1920; emphasis added.):

Chairman Volstead began the discussion:

"Mr. Speaker, this legislation is an old friend that has been pending in Congress a great many years. It has been passed from time to time, sometimes in the House and sometimes in the Senate. The bill, if you will examine the report made upon it, *is intended to supply a defect which now exists under what was the common-law rule* as to actions affecting injuries that might be caused through the wrongful act or neglect of persons engaged in shipping on the high seas. If the injury did not result in death, a cause of action exists; the injured person might go into a court of admiralty and secure relief, but if death resulted courts applied the old common-law doctrine that the cause of action dies with the person; that is, the cause of action was personal and did not survive the injured party.

"The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstances. Under what is known as Lord Campbell's act, England many years ago authorized recovery in such cases. France, Germany, and other European countries now followed this more humane and enlightened policy and allow dependent parties to recover in case of death of their near relatives upon the high seas.

"This bill was introduced in the Senate, has been passed by that body, and is substantially in the form in which it passed this House in the Sixty-fourth Congress. In the Sixty-fifth Congress this same bill, or a very similar one, was reported from the Judiciary Committee, but did not reach consideration on the floor of the House. * * *" (Page 4482, col. 1-2)

"Mr. Mann of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that *the bill was not intended to take away any jurisdiction which can now be exercised by any State court* * * *" (Page 4484, col. 1)

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"Mr. Mann of Illinois. We give a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined." (Page 4484, col. 2)

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"Mr. Mann of Illinois. They would not be required to comply with the laws of a State. The gentleman's proposition [i.e., the bill *before* the Mann amendment] would take away the right of the State to apply its own laws." (Page 4484, col. 2)

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"Mr. Mann of Illinois. That is the way it will be left, *so that the act will not take away any jurisdiction conferred now by the States.*" (Page 4485, col. 1)